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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 187

INDIAN TRAILS, INC.,

Petitioner,

vs.

THOMAS HYNES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, by its attorneys, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered in the above entitled cause on April 24, 1950, and respectfully represents to this Court as follows:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The case before the court is a common law action in tort brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, on grounds of diversity of citizenship, by the respondent, plaintiff below, against the petitioner, defendant below, for personal injuries sustained in the State of Illinois. A question under the full faith and credit clause arises by reason of a defense which petitioner pleaded and to which it is entitled under the Workmen's Compensation Act of Illinois but which was denied it by the District Court and also by the Court of Appeals on the ground that the Michigan Workmen's Compensation Act superseded the Illinois law so as to render the defense unavailable.

Respondent and his employer at the time of the injury were engaged in an enterprise or business subject to the Workmen's Compensation Act of Illinois and petitioner also was engaged in an enterprise which, as regards its operations in the State of Illinois, brought it under the Illinois Workmen's Compensation Act. Petitioner's employee, the driver of the petitioner's motor vehicle at the time of the accident and for whose tort petitioner is charged with responsibility by the respondent in the instant case, was hired in the State of Michigan and as to the business operations of the petitioner and this employee in the State of Illinois, petitioner was simultaneously and concurrently bound by the Workmen's Compensation Act of Michigan as well as the Workmen's Compensation Act of Illinois.[1]

1. The accuracy of this statement, it is submitted, is supported by *Industrial Commission of Wisconsin* v. *McCartin*, 330 U. S. 622, at page 626, 91 L. ed. 1140 at pages 1142-3.

In view of the fact that defendant, petitioner herein, was as to its business in Illinois and with regard to Buckley, its driver, simultaneously bound by two conflicting workmen's compensation laws, the question is presented in this case, under the full faith and credit clause of the United States Constitution, Art. IV, Sec. 1, whether Michigan law superseded Illinois law, prevented the petitioner from being bound by the Illinois Workmen's Compensation Act and rendered nugatory the provisions of section 29 thereof which provided petitioner with a defense to the action brought by the respondent.

The essential uncontroverted facts upon which rests the determination of the legal question presented are as follows:

Respondent, Thomas Hynes, brought an action at common law in tort for damages against petitioner, Indian Trails, Inc., on account of injuries sustained in an accident between a street car on which respondent was the motorman and petitioner's motor vehicle, a 33 passenger motor bus (R. 3, 193). The accident took place on November 18, 1946, in the City of Chicago, County of Cook and State of Illinois (R. 3, 165, 166).

The petitioner at the time of the events in question was a corporation organized in the State of Michigan having its principal office in Owosso, Michigan; its business, which consisted of operating passenger motor vehicles for hire, was conducted in the states of Michigan, Indiana and Illinois, and its motor buses made scheduled trips between points in Illinois, Indiana and Michigan (R. 3, 164, 165, 187). It had in Chicago, Illinois, a terminal at 12th Street and Wabash Avenue and a garage at 2540 Indiana Avenue (R. 9, 221), and it had in its employment employees, some of whom were hired and worked in Illinois and some in Michigan (R. 9, 11). The driver of the particular motor vehicle

involved in the accident, however, was hired and resided in the State of Michigan (R. 13, 16, 169).

The petitioner's motor vehicle involved in the collision was at the time of the accident making a scheduled run beginning in Owosso, Michigan; it was carrying passengers who were picked up and let off en route at various points, in Michigan, Indiana and Illinois, and its destination was 12th Street and Wabash Avenue, Chicago, Illinois (R. 164, 165, 186, 187). When the accident occurred, the motor bus was well inside the city of Chicago, Illinois, at 31st Street and South Parkway, about two miles from the Chicago terminal (R. 164).

Petitioner's business operations in the State of Illinois as a carrier of passengers for hire brought petitioner within the purview of section 3 of the Workmen's Compensation Act of Illinois (Ill. Rev. Stat. 1949, Ch. 48, Sec. 139 and 139(3), thereby making it as to such operations, bound automatically and by compulsion, by the provisions of the Illinois Act.[2]

Aside from petitioner's operations as a carrier of passengers for hire in the State of Illinois being under and subject to the terms and provisions of the Illinois Workmen's Compensation Act by operation of law, petitioner

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2. Section 3 of the Workmen's Compensation Act of Illinois (Ill. Rev. Stat. 1949, Ch. 48, Sec. 139) has the following relevant provisions:

"Sec. 3. APPLIES AUTOMATICALLY.) The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely: * * *

1. * * *

2. * * *

3. Carriage by land, water or aerial service and loading or unloading in connection therewith, * * *."

was also under and subject to such Act by election previously made by it in conformity with the provisions of section 1, and 1(a) of the Illinois Act (R. 7, 20).[3]

Petitioner had made such election by insuring its liability under the provisions of the Illinois Workmen's Compensation Act by taking out a policy of workmen's compensation insurance in a duly licensed and authorized insurance carrier and by so doing petitioner had made provision for the payment of compensation under the provisions of section 26 and section 26(3) of the Illinois Act. (Ill. Rev. Stat. 1949, ch. 48, secs. 163 and 163(3).[4]

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3. Ill. Rev. Stat. 1949, ch. 48, sec. 138 (1) and (1)(a) provides as follows:

> "Section 1. EMPLOYER—NOTICE.] *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That an employer in this State, who does not come within the classes enumerated by section three (3) of this Act, may elect to provide and pay compensation for accidental injuries sustained by any employee, arising out of and in the course of the employment according to the provisions of this Act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided."
>
> "(a) Election by any employer to provide and pay compensation according to the provisions of this Act shall be made by the employer filing notice of such election with the industrial commission, *or by insuring his liability to pay compensation under this Act in some insurance carrier authorized, licensed or permitted to do such insurance business in this State.* (Emphasis supplied.)

4. Section 26 of the Workmen's Compensation Act of Illinois (Ill. Rev. Stat. 1949, ch. 48, secs. 163 and 163(3)) contains the following provisions:

> "Sec. 26. PROVISIONS TO BE MADE BY EMPLOYER ELECTING TO PAY COMPENSATION—APPROVAL OF INDUSTRIAL BOARD—WHEN PROVISION NOT MADE OR NOT APPROVED—INSURANCE LIABILITY—FAILURE TO COMPLY.] (a) Any employer who shall come within the provisions of section 3 of this Act, and any other employer who shall elect to provide and pay the compensation provided for in this Act shall: • • •
>
> "(3) Insure his entire liability to pay such compensation in some insurance carrier authorized, licensed, or permitted to do such insurance business in this State: • • •"

A certificate of insurance[5] on behalf of petitioner was filed with the Industrial Commission in proper compliance with the provisions of paragraph (b) of section 26 of the Illinois Workmen's Compensation Act.

Likewise, the respondent and his employer, the Chicago Surface Lines, at the time and place of the accident in question, were also bound by the Workmen's Compensation Act of Illinois, and respondent sustained accidental injuries which arose out of and in the course of his employment. It is an admitted fact that he made claim against, was paid and accepted compensation from his employer under the Workmen's Compensation Act of Illinois (R. 6, 10).

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5. Paragraph (b) of section 26 of the Illinois Workmen's Compensation Act (Ill. Rev. Stat. 1949, ch. 48, sec. 163) contains the following provision:

"* * * A certificate of compliance with the provisions of subparagraphs 2 and 3 of paragraph (a) of this section shall within five days after the effective date of said policy be delivered by the insurance carrier to the industrial commission. Said policy shall remain in full force and effect until ten days after receipt by the industrial commission of notice of its cancellation or expiration and shall cover all compensation liablility occurring during said time."

The certificate of insurance filed with the Industrial Commission on behalf of petitioner was as follows:

"CERTIFICATE OF INSURANCE.

To The Industrial Commission of Illinois,
205 W. Wacker Drive,
Chicago, Illinois

GENTLEMEN:

This certifies that a Workmen's Compensation insurance policy, written upon the policy form heretofore filed with the Industrial Commission by the undersigned insurer, has been issued and delivered to the employer named below; * * *.

Name of employer insured Indian Trails, Inc.

Individual, Corporation, Partnership, Association, Receiver, Etc. Corporation

Address 109 East Comstock Street, Owosso, Michigan

Location 2340 Indiana Avenue, Chicago, Illinois and elsewhere in State of Illinois

Character of operations of the insured Automobile, Bus,

By the provisions of the first paragraph of section 29 of the Illinois Act (Ill. Rev. Stat. 1949, ch. 48, sec. 166),[6] it is provided that where an injury for which com-

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Livery or Taxicab Companies Garage Employees #6395; All other employees including Chauffeurs and their Helpers #7332 Clerical Office Employees S.C.C. #8510
Name of insurer Continental Casualty Company
Address 310 S. Michigan Avenue, Chicago 4, Illinois
Policy number 3C-4375591/Assignment

Effective Date 5/5/46 — 5/5/47
Assignment Date 10/20/46

Dated this 8th day of November A. D. 46

CONTINENTAL CASUALTY COMPANY
Insurer
By H. P. WELCH
Agent

State of Illinois } ss.
County of Cook }

BEFORE THE INDUSTRIAL COMMISSION OF ILLINOIS.

I, George R. Murphy, do hereby certify that I am the Secretary of the Industrial Commission of the State of Illinois; that as such Secretary, I am the custodian and keeper of the seal and all the files, records, documents and papers thereof;

And I Do Further Certify that the foregoing is a full, true, correct and complete copy of Certificate of Insurance filed under date of November 12, A. D. 1946, by Continental Casualty Company, evidencing compliance with the provisions of Section 26 of the Illinois Workmen's Compensation Act by Indian Trails, Inc., a corporation, which said certificate of insurance was in full force and effect and unterminated on November 18, A. D. 1946.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Industrial Commission of the State of Illinois, this 19th day of May, A. D. 1947.

GEORGE R. MURPHY,
(SEAL) *Secretary of the Industrial Commission of the State of Illinois.*

6. The first paragraph of section 29 of the Workmen's Compensation Act of Illinois (Ill. Rev. Stat., 1949, ch. 48, sec. 166) provides as follows:

"Sec. 29. WHERE INJURY CAUSED UNDER CIRCUMSTANCES CREATING A LEGAL LIABILITY IN SOME PERSON OTHER THAN THE EMPLOYER.] Where an injury or death for which com-

pensation is payable under the Workmen's Compensation Act is "caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by the Act, or being bound thereby under section (3) of this Act" then the right of such injured person to recover against such other person shall be transferred to his employer who may bring an action against such other person to recover, but damages are limited to the amount of compensation payable under the Act by reason of the employee's injury.

Petitioner made a motion based on the terms of section 29 to dismiss respondent's suit on the grounds that the latter was without legal capacity to maintain the action for the reason that the respondent, his employer the Chicago Surface Lines, and the petitioner were all operating under and subject to the terms and provisions of the Workmen's Compensation Act of the State of Illinois; and that by virtue of the statutory terms and provisions of section 29 of such Act, all rights existing in the respondent by reason of such injuries were transferred to his employer, the Chicago Surface Lines (R. 6, 7, 8, 9, 18, 19, 20, 21).

Respondent, to avoid the bar of section 29 as a defense, alleged that petitioner was operating under and was bound by the Illinois Workmen's Compensation Act in respect to various employees, other than the driver of the mo-

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pensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

tor vehicle mentioned in the complaint (R. 11), but that with respect to him, petitioner was bound by the Workmen's Compensation Act of Michigan; that the Michigan Act must be given full faith and credit (R. 11); that, therefore, petitioner was not bound by the Workmen's Compensation Act of Illinois (R. 11, 22), and that respondent's right to sue was not transferred to his employer.

The District Court sustained respondent's contention and respondent recovered a verdict and judgment against petitioner which was affirmed by the United States Court of Appeals. In its opinion the Court of Appeals held that under the facts of this case the Michigan Act was applicable as between petitioner and its driver and that the force of the Michigan statute was such that it rendered section 29 of the Illinois Act inapplicable and unavailable to petitioner as a defense in this suit (R. 248-251).

BASIS FOR JURISDICTION OF THIS COURT.

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED.

(1) Whether the extra state effect of the Workmen's Compensation Act of Michigan which might govern the legal relations of petitioner and its employee, Buckley, in Illinois, shall be determinative of the question whether respondent has the legal capacity to bring the instant action against the petitioner; or in other words, whether, in an action *ex delicti* in a federal court in the State of Illinois brought by respondent, a citizen and resident of, for a tort committed, in Illinois, against petitioner, a Michigan corporation doing business in Illinois, jurisdiction being based on diversity of citizenship, in which action section 29 of the Workmen's Compensation Act of Illinois is a bar for the reason that the respondent, his employer, and the petitioner were each and all operating under such Act, and which section 29 expressly provides respondent's right to recover shall be transferred to his employer, the respondent, may in avoidance of such statutory bar, contend: (1) that in the instant case petitioner is not bound by the Workmen's Compensation Act of Illinois for the reason that it and its employee, Buckley,—the latter not a party to the suit—were subject to the Workmen's Compensation Act of the State of Michigan; (2) that the extra state effect of the Michigan Act in Illinois is to vitiate the operation of the Illinois Workmen's Compensation Act as to petitioner so as to exclude petitioner from its provisions; (3) that petitioner therefore is no longer bound by the Illinois Act within the meaning of the term as used in section 29 of such Act; (4) that the provisions of the said section 29 transferring respondent's right to recover to his employer are inapplicable, and (5) that respondent must be permitted to maintain the instant suit.

(2) Whether the law of the State of Michigan will be permitted to override the law of the State of Illinois, in an action *ex delicti* where Illinois is both the *lex loci delicti* and the *lex fori,* in which plaintiff is a resident and citizen of the State of Illinois and defendant a foreign corporation engaged in business there, where no showing is made on any rational basis that the State of Michigan has an interest in the welfare of plaintiff and defendant, or in the legal relationship between them, superior to that of the State of Illinois.

(3) Whether the District Court and Court of Appeals may hold, in a case where jurisdiction is based on diversity of citizenship, that an employer may be bound by the Workmen's Compensation Act of Illinois as to one part of his business or enterprise and not be bound as to another part of such business or enterprise contrary to express statutory enactment and judicial declaration of the courts of the State of Illinois.

REASONS FOR ALLOWANCE OF WRIT.

(1) The holding of the Court of Appeals substantially is that (1) under the facts in the instant case the Michigan Workmen's Compensation Act is applicable as between petitioner and its employee, Buckley, and (2) that this renders the Illinois Workmen's Compensation Act inapplicable and unavailing as a defense to petitioner.

It is respectfully submitted the Court of Appeals either overlooked the fact that petitioner and its employee, Buckley, were simultaneously and concurrently bound by the workmen's compensation acts of both the State of Michigan and the State of Illinois, or assumed that the extra-state effect of the Michigan Act vitiated the operation of the Illinois Act as to petitioner and its driver Buckley in Illinois. The present action is brought by respondent against petitioner at common law for a tort in the State of Illinois, and is in no way predicated upon any of the provisions of the Workmen's Compensation Act of Michigan; and the effect of the holding of the Court of Appeals is the extension of the Michigan Workmen's Compensation Act to confer on respondent a legal capacity to sue over the express prohibitory provision of the Illinois Workmen's Compensation Act. By so holding it is respectfully submitted the Court of Appeals extended the doctrine of extra territoriality of a state statute under the full faith and credit clause of the United States constitution one step further than, and in a direction not heretofore countenanced, in any case previously decided by this Honorable Court.

This construction of the full faith and credit clause goes beyond any presently recognized requirement of that clause as interpreted by this Honorable Court. In fact it transcends the limitations with which this court has circumscribed that clause.

(2) The construction of the Illinois Workmen's Compensation Act adopted by the Court of Appeals, sitting as an Illinois forum (*Guaranty Trust Co. of New York* v. *Work,* 326 U. S. 99, 89 L. ed. 2079) holding that in order to plead section 29 of the Act as a defense, a defendant must not only be engaged in an extra hazardous enterprise, or have filed an election to be bound by the Act, but that in addition, it is required that the employee for whose negligence defendant is charged with responsibility shall have been hired in the State of Illinois, establishes a construction of the Workmen's Compensation Act of Illinois neither sanctioned or authorized by the express language of section 29 of the act, or by the courts of Illinois in any of the many cases in which they have been called upon to interpret that section of the act.

(3) The Court of Appeals in construing the Workmen's Compensation Act of Illinois to the effect that an employer may be bound by the Act as to one part of his business or enterprise and not as to another part of such business or enterprise has laid down a rule of interpretation out of harmony with the very wording of section three (3) of such Act (Illinois Rev. Stat. 1949 Ch. 48, Sec. 139) and with the construction of such section as given by the Supreme Court of Illinois. (*Illinois Publishing Co.* v. *Ind. Com.,* 299 Ill. 189, 132 N. E. 511, and *McNaught* v. *Hines,* 300 Ill. 167, 133 N. E. 53.)

The construction adopted by the Court of Appeals is

inconsistent with Illinois policy and represents a serious departure from what has been considered to be settled law of the State of Illinois.

Respectfully submitted,

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vs.

THOMAS HYNES,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals has been published at 181 Fed. (2) 668 and appears in the transcript of the record at pages 248-251.

BASIS FOR JURISDICTION OF THIS COURT.

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254 (1).

STATEMENT OF THE CASE.

A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, is set forth on pages 2 to 9 of the Petition for Writ of Certiorari, and for brevity is not here repeated.

SPECIFICATION OF ERRORS.

I. The Court of Appeals erred in its interpretation of the full faith and credit clause as it bears on the extra-state effect of state statutes and gave to the Michigan Workmen's Compensation Act an extra territorial application as to persons and events in Illinois in excess of any requirement of the full faith and credit clause as interpreted by this court, and in violation of the sovereign right of the State of Illinois to determine and regulate for itself matters of internal and domestic concern.

II. The Court of Appeals erred in holding that the place of hire of petitioner's servant was material and of legal significance in determining whether respondent had legal capacity to bring the action against the petitioner in the instant case.

III. The Court of Appeals erred in holding that petitioner may be subject to and bound by the provisions of the Workmen's Compensation Act of Illinois as to one part of a single business and not so bound as to another part, contrary to the express statutory declaration and judicial interpretation thereof by the courts of the State of Illinois.

ARGUMENT.

I.

As Expressly Provided by Statute—Section 29 of the Workmen's Compensation Act of Illinois (Illinois Revised Statutes 1949, Chapter 48, Section 166)—and as Repeatedly Held by the Supreme Court of Illinois, an Injured Employee Entitled to Receive Compensation from His Employer Under the Terms and Provisions of the Workmen's Compensation Act Cannot Maintain a Cause of Action Against a Negligent Third Party Who Is Bound by the Act.

It is respectfully submitted that under the uncontroverted facts in the instant case as hereinbefore set forth under the summary and short statement of the matter involved, in the light of the express applicable statutory provisions of section 29 of the Workmen's Compensation Act of Illinois, (Ill. Rev. Stat. 1949, ch. 48, sec. 166), the respondent has no right or legal capacity to maintain the present action against the defendant.

For convenience of reference the applicable provisions of such section directly applicable to the facts in the instant case are quoted herewith as follows:

> "Sec. 29. WHERE INJURY CAUSED UNDER CIRCUMSTANCES CREATING A LEGAL LIABILITY IN SOME PERSON OTHER THAN THE EMPLOYER.) Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances *creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby*

under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person *shall be transferred to his employer* and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee." (Emphasis supplied.)

The second paragraph, or rather the second division of section 29 (Ill. Rev. Stat. 1949, ch. 48, sec. 166)[7] makes provision for prosecuting an action against a negligent third person where such person has elected "not to be bound by this act."[8]

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7. Ill. Rev. Stat. 1949, Ch. 48, Sec 166 • • •:

"Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, such other person having elected not to be bound by this Act, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative.

If the injured employee or his personal representative shall agree to receive compensation from the employer or accept from the employer any payment on account of such compensation, or to institute proceedings to recover the same, the said employer may have or claim a lien upon any award, judgment or fund out of which such employee might be compensated from such third party. • • •"

8. Parenthetically, it may be stated the phrase "such other person having elected not to be bound by this Act," remains in the original form as it stood in the Illinois Workmen's Compensation Act as enacted in 1913, when the Act was elective. Under the Act as originally enacted, certain businesses and enterprises

Under such circumstances, that is where the negligent third party is not under the act, the injured employee may prosecute an action for damages against such negligent third party. Further provision is made by the second division of section 29 for reimbursing the employer of the injured for any sums of money the employer has been required to pay as compensation under the provisions of the Act.

The effect of section 29 on the employee's common law right of recovery in Illinois as consistently declared by the courts of Illinois is illustratively stated in *Thornton* v. *Herman*, 380 Ill. 341, 43 N. E. (2d) 934, the court there stating (p. 344):

> "Section 29 divides negligent third parties into two classes, namely: those that are bound by the act and those that are not. It is definitely settled by the various cases in which section 29 has been construed that an injured employee cannot maintain a cause of action against a negligent third-party employer who is bound by the act. (*Keeran* v. *Peoria, Bloomington and Champaign Traction Co.*, 277 Ill. 413; *O'Brien* v. *Chicago City Railway Co., supra.*) The cause of action which the injured employee has is by operation of the statute

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were presumed to have elected to be bound by the Act unless a notice in writing had been filed with the Illinois Industrial Commission. Subsequently in 1917 (Ill. L. 1917, p. 507), by amendment to section 3 enacted by the Illinois legislature (Ill. Rev. Stat. 1949, ch. 48, sec. 139), the Act was made and ever since has remained compulsory without right of election as to such enterprises or businesses which were enumerated and declared by the Act to be extra hazardous. While the Act remains elective as to non-hazardous enterprises or businesses, no such right of election exists as to any of the enterprises or businesses operating in the State of Illinois which fall within the legislative classification and description as being extra hazardous and while the original phrase "such other person having elected not to be bound by the Act" as used in the second paragraph or division remains unchanged and therefore is an anachronism, such phrase has been construed and applied by the Illinois courts as meaning simply any person who is not bound by the Act. (See *City of Chicago* v. *Pizel*, 315 Ill. App. 216, 217, 42 N. E. (2d) 850, 851.)

> transferred to his employer and he is limited in his right of recovery to the amount of the award for which he has become liable."[9]

It is undisputed in the instant case that as regards its operations in the State of Illinois, the petitioner was operating under and subject to the provisions of the Illinois Workmen's Compensation Act both by election and also because of the compulsory provisions of section three (3) of said Act.

The enterprise or business conducted by the Chicago Surface Lines, the respondent's employer, also was clearly and admittedly under the Workmen's Compensation Act of Illinois, and the respondent was paid compensation by such employer, the Chicago Surface Lines, on account of his injuries in accordance with the provisions of the Illinois Act.

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9. The transfer of the employee's right to recover to his employer under section 29 of the Act has been held not contrary to public policy of the State of Illinois (*Lincoln Park Coal and Brick Co.* v. *Wabash Railroad Co.*, 338 Ill. 82, 170 N. E. 8), and the constitutionality of section 29 has been repeatedly sustained by decisions of the Illinois Supreme Court. (*Keeran* v. *Peoria, Bloomington and Champaign Traction Co.*, 227 Ill. 413, 115 N. E. 636; *Johnson* v. *Choate*, 284 Ill. 214, 119 N. E. 972; *Gones* v. *Fisher*, 286 Ill. 606, 122 N. E. 95; *Taylorville* v. *Central Illinois Pub. Service Co.*, 301 Ill. 157, 133 N. E. 720; and *Baker* v. *Ruseto*, 306 Ill. 602, 138 N. E. 206.)

As stated in *Friebel* v. *Chicago City Ry. Co.*, 280 Ill. 76, at p. 89, 117 N. E. 467:

> "We do not think there is any single objection raised to the constitutionality or validity of this section of the statute that can be sustained."

II.

The Law of Illinois Is Neither Superseded Nor Vitiated by the Purported Extrastate Effect of the Michigan Workmen's Compensation Act.

(A) In matters of tort, the lex loci delicti governs the rights and liabilities of the parties.

Under the *lex loci delicti,* the law of the State of Illinois, the respondent in this case should have been held without legal capacity to bring this action. The Court of Appeals held, however, that under the facts of this case, "the Michigan act (is) applicable here as between defendant and its employee, Buckley, and thereby renders the Illinois Act inapplicable and unavailable as a defense to this defendant."

The holding of the Court of Appeals, it is submitted, is untenable; is not supported by any decided case, and is contrary to long established principles and rules of conflicts of laws.

There is no legal principle by which the application of any law, other than that of Illinois to the facts of the instant case can be sustained. The action brought by the respondent against the petitioner sounds in tort and is based on an allegedly negligent act committed in the State of Illinois. Under the acknowledged and recognized rules of conflicts of law, the *lex loci delicti* governs. Such rules determine whether the act committed constituted a tort, and its legal effects and incidents, and the existence of any defenses thereto. (*Gray* v. *Gray,* 174 Atl. 508 (N. H.) 1934.)

According to the decisions of this court, if the operative facts occur in the state of Illinois, the law of Illinois governs. (*Moore* v. *Chesapeake & Ohio Ry. Co.,* 291 U. S. 205, 78 L. ed. 755; *Northern Pacific R. R. Co.* v. *Babcock, Adm.,* 154 U. S. 190, 38 L. ed. 958.)

In *Cuba R. R. Co.* v. *Crosby,* 222 U. S. 473 at p. 478, 56 L. ed. 274 at p. 276, Mr. Justice Holmes said:

> "With very rare exceptions, the liabilities of the parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it * * * (citation of cases) * * * That and that alone, is the foundation of their rights."

The statutory law of the state where the act is committed as well as the common law of such state establishes the defendant's liability, if any, and determines the legal consequence of acts committed in such state. (*Young* v. *Masci,* 289 U. S. 253, 77 L. ed. 1158.)

Consistently with the doctrine of *Young* v. *Masci, supra,* but with respect to corporations, rather than individuals, the American Law Institute, Conflict of Laws § 166, adopted the rule as follows (p. 242):

> "Effect of an act, directed to be done by a foreign corporation is governed by the law of the state where it is done.
>
> (b) Liability in tort: If an agent of a foreign corporation while acting in the course of his employment commits a tort, the law of the state where the act was done determines whether his corporation is liable for the tort and the extent to which it is liable therefor."

The petitioner, although a Michigan corporation upon entering into the State of Illinois and engaging in business there, subjected itself to the rules and regulations of the law of the State of Illinois in all respects. (*Dunbar* v. *American Telephone Co.,* 224 Ill. 9, at p. 24, 79 N. E. 423.) As a foreign corporation doing business in the State of Illinois, petitioner is entitled to the equal protection of the law of the State of Illinois and is entitled to stand before the law upon equal terms and to enjoy the same rights and to bear the same burdens as are imposed upon other

persons in like situations. (*Southern R. R. Co.* v. *Greene,* 216 U. S. 400, at p. 412, 54 L. ed. 536, at p. 539.)

One of the privileges conferred upon the petitioner under Illinois law, by incurring the burdens and obligations consequent to being bound by the Workmen's Compensation Act of Illinois, is the right to plead section 29 of that Act in bar to an action for tort when brought by a plaintiff, who is also bound by the Act, for an injury arising out of and in the course of his employment.

Not only must it be conceded that the law of Illinois, it being the *lex loci delicti* and the *lex fori,* must govern the rights and liabilities of the parties involved, but if the matter is viewed from the standpoint of the State of Michigan it can safely be said, it is respectfully submitted, that the Michigan legislature in enacting the Michigan Workmen's Compensation Act (Mich. Com. Laws, 1948, sec. 411.1, *et seq.*) and incorporating therein an exclusive and extra territorial remedy (Mich. Comp. Laws, 1948, sec. 413.19)[10] did not intend or contemplate that Michigan law should vitiate Illinois law or the law of any other state with respect to the acts of a Michigan employer engaged in a business or enterprise in Illinois or in any other state which automatically made it subject to the workmen's compensation act of such latter state; neither, it is respectfully submitted, did the Michigan legislature intend that under such circumstances the Michigan employer would not, and should not be bound by the law of Illinois or of any other state, contrary to express statutory declaration of the law of such latter state. Such

10. Mich. Comp. Laws 1948, sec. 413.19: The industrial accident board shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state, in those cases where the injured employee is a resident of this state at the time of the injury, and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this Act.

legislative intention would be beyond legislative power. (Beale: Conflict of Law, Vol. 1, pp. 308, 309.)

It would seem that the reasonable scope of the extraterritorial provisions of the Michigan Workmen's Compensation Act would be that the remedy for extraterritorial injury should be recognized when claim is made in a Michigan forum, and in the forums of other states when comity permits.

In *N. Y. Cent. R. Co.* v. *Chisholm,* 268 U. S. 28, at p. 32, 69 L. ed. 828, at p. 832, where an attempt was made to recover under the provisions of the Federal Employer's Liability Act (45 U. S. C. Sec. 51, *et seq.*) for injuries sustained in Canada, the court, denying recovery, stated:

> "Legislation is presumptively territorial and confined to limits over which the lawmaking power has jurisdiction." *Sandberg* v. *McDonald,* 248 U. S. 185, 195, 63 L. ed. 200, 204, 39 Sup. Ct. Rep. 84.
>
> "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. * * * For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. * * * The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is prima facie territorial'." *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 356, 357, 53 L. ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047.
>
> "* * * But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obli-

gation (*Smith* v. *Condry*, 1 How. 28, 11 L. ed. 35), but equally determines its extent. *Slater* v. *Mexican Nat. R. Co.*, 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581."

In *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 250 U. S. 2, 63 L. ed. 810, an insurance broker sold policies of insurance issued by a Pennsylvania company in Tampa, Florida. It was contended that the law of Pennsylvania applied to the acts of the insurance broker committed in the State of Florida. Holding to the contrary the court said (p. 815):

> "Nor does this case present an attempt by Florida to intrude itself into the State of Pennsylvania; it presents simply a Pennsylvania corporation having the permission of that state to underwrite policies on property outside the State, and the exercise of that right in Florida. *And necessarily, it had to be exercised in accordance with the laws of Florida.* There was no law to the contrary—*no law of Pennsylvania would have power to the contrary.*" (Italics ours.)

In the case of *Texas & Pacific R. Co.* v. *Humble*, 181 U. S. 57, 45 L. ed. 747, where an injury to a married woman took place in Arkansas, and where suit was brought, it was attempted to invoke a married woman's statute of Louisiana, in which she was domiciled. The court said (p. 61):

> "These injuries were inflicted and this action was brought in the State of Arkansas. The place of the wrong and the place of the forum concurred, and the law of that place governs."

(B) The extrastate effect of states' statutes as to persons, and to events occurring in another state, not having been regulated by Act of Congress, depends on the comity of the state in which the persons are, or in which the event occurred.

Respondent and petitioner in the instant case are subject to but one law, the law of the State of Illinois, which in this case is the *lex loci delicti* and the *lex fori,* so that no question of conflicts of law or full faith and credit actually exists between them. The respondent interjected a question of conflicts of law, however, by alleging that petitioner and its driver Buckley, who was not made a party to the suit, were bound by the Workmen's Compensation Act of Michigan and by such plea obtained a holding by the District Court and the Court of Appeals which nullified the operation of Illinois Workmen's Compensation Act as to petitioner. This plea by the respondent was grounded on the erroneous theory, however, that Michigan law has extraterritorial force and could by its own force pre-empt and exclude petitioner from the operation of the Illinois act. No case has sustained this theory of extraterritoriality. Not even in a case where the parties to the action stand in an employer-employee relationship and have, by their contract of hire, submitted to the jurisdiction of the foreign State, and where the only question is, in an action between such employer and employee, whether the compensation act of the one state rather than that of another shall provide the remedy, has any court gone so far as to say that a legislature of one state has power to legislate extraterritorially over persons and events in the other state, and to vitiate the law of such latter state.

In *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145 at p. 157, 76 L. ed. 1026, at p. 1034, Mr. Justice Brandeis said:

> "The answer is that such recognition in New Hampshire of the rights created by the Vermont Act, can

not, in any proper sense, be termed an extraterritorial application of that Act. Workmen's compensation acts are treated, almost universally, as creating a statutory relation between the parties—not, like employer's liability acts, as substituting a statutory tort for a common law tort. * * * The mere recognition by the courts of one State that parties by their conduct have subjected themselves to certain obligations arising under the law of another State is not to be deemed an extraterritorial application of the law of the State creating the obligation. Compare *Canada S. R. Co.* v. *Gebhard,* 109 U. S. 527, 536, 537, 27 L. ed. 1020, 1024, 3 S. Ct. 363." [11]

The *Clapper* case, severely criticized by Prof. Jos. H. Beale in his authoritative work on Conflict of Laws (Vol. 1, p. 312), may be said to be the high water mark of the theory of "recognition," or the extra-state force of legislation to control legal effects of persons and events in another sovereign state. Yet, this principle is limited to

11. In a concurring opinion, Mr. Justice Stone said (p. 163):
"If decision of that question could not be avoided, I should hesitate to say that the Constitution projects the authority of the Vermont statute across state lines into New Hampshire, so that the New Hampshire courts, in fixing the liability of the employer for a tortious act committed within the state, are compelled to apply Vermont law instead of their own. The full faith and credit clause has not hitherto been thought to do more than compel recognition, outside the state, of the operation and effect of its laws upon persons and events within it.

"It is true that in this case the status of employer and employe, terminable at will, was created by Vermont laws operating upon them while they were within that state. I assume that the fact of its creation there must be recognized elsewhere, whenever material. But I am not prepared to say that that status, voluntarily continued by employer and employe and given a locus in New Hampshire by their presence within the state, may not be regulated there according to New Hampshire law, or that the legal consequences of acts of the employer or employe there, which grow out of or must, by mandate of the Constitution, be either defined or controlled, in the New Hampshire courts, by the laws of Vermont rather than of New Hampshire."

an employer-employee relationship voluntarily entered into in the jurisdiction of the foreign state; it furnishes no principle or rule applicable to the facts in the case at bar, between two parties who do not stand in an employer-employee relationship to each other, and the legal nexus between them being a tort committed in Illinois and one of the parties, the respondent, according to the undisputed evidence in this case, being a stranger to the Michigan law. Whatever effect might be given to Michigan legislation outstide the territorial limits of Michigan under the theory of the *Clapper* case involving a question between an employer and employee, certainly that theory should not be extended by implication and deduction to a new and different situation, not within the reasonable contemplation of the facts of that case.

The sovereign right of one state to determine matters of domestic policy and internal affairs, despite the full faith and credit clause is further considered and defined in *Alaska Packers' Assn.* v. *Industrial Accident Commission,* 294 U. S. 532, 79 L. ed. 1044, and *Pacific Employers Ins. Co.* v. *Industrial Accident Commission,* 306 U. S. 493, 83 L. ed. 940.

In the *Alaska Packers* case an injury occurred in Alaska but a claim was filed in California in which state the contract of hire was made. By its terms, the Alaska Workmen's Compensaiton Act was applicable, and the question before the court was whether California was required to withhold the application of its own compensation law and either apply the Alaska Act or remit the parties to Alaska for their remedy. California was obliged to do neither, the Court held, and in the opinion, Mr. Justice Stone said (p. 547):

> "Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force

> given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other."

In *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 83 L. ed. 940, a claim was filed in California where the injury occurred but objection was made to the jurisdiction under the full faith and credit clause on the ground that Massachusetts, in which state the contract of hire was made, afforded an exclusive remedy. This contention was denied, and the court re-affirming the principles laid down in the *Alaska Packers Assn.* case, in addition said (p. 502):

> "And in the case of statutes, the extrastate effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.
>
> This court must determine for itself how far the full faith and credit clause compels the qualifications or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state. * * * Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees

while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power."

Neither the holding nor the principles declared in the opinion of the court in the *Clapper, Alaska Packers,* or *Pacific Employers* cases, *supra,* previously referred to give credence to the theory adopted by the Court of Appeals that where an employer and employee are simultaneously and concurrently bound by the Workmen's Compensation Act of two states, that the law of one state vitiates the law of the other. At most, these cases reaffirm the rule that each state may in its own tribunal apply its own law,[12]

12. In *Pink* v. *A. A. A. Highway Express, Inc.*, 314 U. S. 201 at p. 209, 86 L. ed. 152, at p. 158, the court said:

"Every state has authority under the Constitution to establish laws through both its judicial and legislative arms, which are controlling upon its inhabitants and domestic affairs. When it is demanded in the domestic forum that the operation of those laws be supplanted by the statute of another state, that forum is not bound, apart from the full faith and credit clause, to yield to the demand, and the law of neither can, by its own force, determine the choice of law for the other * * *.

* * * But the full faith and credit clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own * * *.

* * * But the very nature of the federal union of states, each of which reserves the sovereign right to make its own laws, precludes resort to full faith and credit clause as means of compelling one state to subordinate its own laws and policies concerning its peculiarly domestic affairs to the laws and policy of others * * *.

* * * The undue extension of the statutes and authority of a state beyond its own borders by the expedient of ren-

unless an overriding superior interest is shown on the part of the other state.

That Illinois may alter, modify or change the common law, and that, in Illinois an employee, subject to the Act, may be rendered without legal capacity to sue a negligent third party also bound by the Act, is a matter of legislative discretion for Illinois to determine and is a valid exercise of legislative power. (*New York Cent. R. Co.* v. *White*, 243 U. S. 188, 61 L. ed. 667, *Chi. R. I. & P. R. R. Co.* v. *Cole, Adm.*, 251 U. S. 54, 64 L. ed. 133, and *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 68 L. ed. 366.)

III.

Under the Theory of Balancing the Interest of Two Sovereign States Whenever Their Laws Conflict, On No Rational Basis Can It Be Shown That Illinois Has Not a Superior Interest Under the Circumstances of This Case so That Its Law Rather Than the Law of Michigan Should Apply.

It is respectfully submitted that Illinois law, unhampered and unimpeded by Michigan law must be held to govern the rights and liabilities, if any, of the petitioner.

Three decided cases in Illinois, *Cole* v. *Ind. Com.*, 353 Ill. 415, 187 N. E. 520, *Biddy* v. *Blue Bird Air Service*, 374 Ill. 506, 30 N. E. (2d) 14, and *Miller* v. *Yellow Cab Co.*, 308 Ill. A. 217, 31 N. E. (2d) 406, involved the situation of an employee hired in foreign state and injured in Illinois, but in none of these cases were the employers

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dering a judgment against non-citizens over whose persons or property the state has acquired jurisdiction, may infringe due process. *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A. L. R. 701. Like, but more cogent, reasons may call for the restriction of the full faith and credit clause as the instrument for controlling the law and policy of one state, with respect to its domestic affairs, by the statutory command of another."

of such employees sued by a third person on account of any tort or delict actually, or allegedly, committed by such employee, and the question whether the employer, under such circumstances was bound by the Act and would or would not be entitled to the benefit of section 29 of the Act, in the event of suit brought against him, was not presented for the consideration of the court. These cases cannot be considered as precedents as to the problem now at issue.

However, the courts of Illinois in construing and applying the provisions of section 29 of the Act which are relevant to the facts in the instant case, have consistently held that where as in the instant case the accident for which damages are claimed arose out of and in the course of the plaintiff's employment, and the plaintiff's employer and the negligent third party were operating under and subject to the provisions of the Workmen's Compensation Act of Illinois, the plaintiff's right of action was transferred by reason of the provisions of section 29 of such Act to his employer, leaving the plaintiff without legal capacity to sue and that the plaintiff's only right was to recover compensation from his employer as provided by the Illinois Workmen's Compensation Act. (*O'Brien* v. *Chicago City Ry. Co.*, 305 Ill. 244, 137 N. E. 214; *Thornton* v. *Herman*, 380 Ill. 341, 43 N. E. (2d) 934; *Mueller* v. *Elm Park Hotel Co.*, 391 Ill. 391, 63 N. E. (2d) 365; *Ketler* v. *Ind. Com.*, 392 Ill. 564, 65 N. E. (2d) 359; *Dinwiddie* v. *Siefkin*, 299 Ill. App. 316, 20 N. E. (2d) 130, and *Walsh* v. *Central Cold Storage Co.*, 324 Ill. App. 402, 58 N. E. (2d) 325.)

This rule of law as established by decisions of the Illinois courts in construing and applying the provisions of section 29 has been consistently followed, the only known departure being the decision of the Court of Appeals in the instant case, where as above stated, the employee for whose

negligent act damages are sought was hired in the State of Michigan.

Although petitioner earnestly submits that no conflict of law question exists between petitioner and respondent, and that no sufficient basis exists for invoking Michigan law in the lawsuit between them, yet if it is considered that incidental conflict between Michigan law and Illinois law as regards petitioner and its driver Buckley, who was not a party to the action, is material to the case, and the test or principles deducible from the *Clapper, Alaska Packers* and *Pacific Employers* cases, *supra,* applied, it at once appears that Michigan law must fall short of altering the legal position of the petitioner as far as any rights asserted by respondent are concerned.

The rules or principles deducible from the above mentioned cases, it is submitted, are:

1. Illinois is not restricted by the full faith and credit clause from making and applying its law to persons and events within the State of Illinois despite the fact that such persons or one of them may have entered into a contract or a statutory obligation under the laws of a foreign state.

2. Michigan law by its own force cannot override Illinois law in courts of the State of Illinois with respect to persons and events in Illinois, and declare that a given person, real or artificial, shall, or shall not, be bound by a particular law or shall, or shall not plead a given Illinois defense.

3. That in a case of conflicting statutes, one who challenges the right of a state to enforce its own law with respect to persons and events in the state of the forum has the burden of showing, upon some rational basis, that, of the conflicting interests, those of the foreign state are superior to those of the forum.

Applying the preceding principles insofar as they are susceptible to application in the case at bar, it is at once clear that the State of Illinois is not precluded from holding its own law applicable to an employer, a Michigan corporation subject to the Michigan Workmen's Compensation Act, when engaged in Illinois, in "carriage by land", an enterprise specified as extra-hazardous in section three of the Illinois Act, and which employer in addition filed a certificate of insurance with the Industrial Commission of Illinois pursuant to the provisions of section 1 of the act, and thereby became indisputably bound as an employer under the Illinois Act as regards its operations in the State of Illinois.

Furthermore, whatever terms and provisions the Michigan legislature saw fit to include in its Act, as to injuries which occur outside the state, the Workmen's Compensation Act of the State of Michigan cannot by its own force override the Illinois law and vitiate Illinois law so that a given employer in Illinois, otherwise bound, would not be bound by the Illinois Act.

Turning attention to the matter of conflicting interests, however, and if it is considered necessary under the facts of the case to consider the incidental conflict between Illinois law and Michigan law as regards petitioner and its driver, who is not a party to the suit, to determine whether the respondent has legal capacity to bring this action, then it is respectfully pointed out that one of the principal elements in considering, or balancing the conflicting interests of the two states is the fact of actual injury to an employee who is hired, and lives in the other state. When no demonstrable injury is shown, and no claim therefore made under the laws of such other state—which the evidence shows to be the fact with respect to petitioner's driver in this case—one of the principal reasons for balancing the inter-

est in favor of such state is lacking. In such case, where the claim of one state for recognition of its law in the state of the forum for acts committed within the confines of the latter, is based on the imaginary, or hypothetical, claim by an employee so that even in state of hire his right to a remedy is inchoate, or highly speculative, and there is no real necessity for the recognition of a remedy, the claim of the state of hire for recognition of its law in the state of the forum rests on no firm foundation. Buckley, in the instant case having made no claim under Michigan law, the necessity for recognition is purely hypothetical.

If the remedy of the servant against petitioner is properly recognizable under Michigan law, in the event claim had been made, it is only because the State of Michigan has a superior interest in the welfare of the petitioner and driver both of whom have, by their contract of hire submitted to Michigan jurisdiction. If it were held that Buckley did have a remedy under Michigan law, the basic considerations which might operate to give the State of Michigan a superior interest with respect to providing a remedy for Buckley against his employer would be the fact that Buckley's presence in the State of Illinois is of a temporary and transitory character, while he may be a citizen of, and have his residence and family in the State of Michigan; whether he has his remedy in one state or the other, while it may be of passing interest to the State of Illinois, is of great importance to the State of Michigan.

With respect to the employer, doing business in the State of Illinois, having other employees there, the situation is far different. Where an employer is in business in both the States of Illinois and Michigan, can it not be said with equal logic that in regard to acts and events in Illinois, the State of Illinois has as great an interest in such employer as has the State of Michigan? If the conflicting in-

terests of Michigan and Illinois are to be balanced and when the point of emphasis is shifted from the claim and rights, contingent or real, of the employee, to the status and position of the employer, who asserts a right expressly provided under the Statute of Illinois as a defense as was done in this case, then it would seem the interest of Illinois as to an employer doing business, and as to operative facts occurring in Illinois, must be given its just due.

More particularly is this true when the respondent, the other party to the suit, the real beneficiary under the holdings of the District Court and the Court of Appeals of the question of balancing of interests, is a stranger to Michigan jurisdiction and Michigan law and is solely and wholly subject to Illinois law, and the basis upon which the supremacy of Michigan law as to persons and events in Illinois is predicated, is the speculative and nascent right of petitioner's employee against petitioner under Michigan law for a hypothetical injury in Illinois to such employee.

If the question before the court is viewed from the standpoint of the competing interests of the State of Illinois and the State of Michigan in the legal status of either petitioner or respondent, or if it is viewed from the standpoint of the right of either petitioner or respondent to claim a benefit in either's favor or impose a detriment upon the other by invoking the law of the State of Michigan, the holding of the Court of Appeals under the facts of this case is an unwarranted extension of the theory of extraterritoriality, not supported by any decided case.

The ruling of the Court of Appeals is erroneous, furthermore it is submitted, in holding the place of hire is material to petitioner's right to plead section 29 of the Act because an employer is bound by the Illinois Act not by reason of the place of hire of any given employee, but by virtue

of the employer's having an election to be bound, or by virtue of the extra hazardous nature of the employer's business or enterprise. Moreover, the liability of the employer under the doctrine of *respondeat superior* for the act of his employee remains the same in any given case irrespective whether the agent is hired within, or without, the State of Illinois. No case of which petitioner has knowledge ever has held that the place of hire was of legal significance or material to the issue of liability under the doctrine of *respondeat superior.*

IV.

The Court of Appeals Failed to Apply the Illinois Rule that If Any Department of a Particular Business or Enterprise Comes Within the Compulsory Provisions of Section Three (3) of the Workmen's Compensation Act of Illinois Because of Being Extra Hazardous as Classified by the Illinois Legislature, Then All Phases and Departments of Such Business or Enterprise Are Under and Subject to the Terms of Such Act.

Aside from exceptions in cases where part of an employer's operations come within the purview of a federal law, it is an established rule of law in Illinois that if any particular business or enterprise comes within the compulsory provisions added by amendment in 1917 of the Workmen's Compensation Act (Ill. Rev. Stat. 1949, ch. 48, sec. 139), because of being extra hazardous as classified by the Illinois legislature, then all phases and departments of such business or enterprise are under and subject to the terms of such Act (*Illinois Publishing and Printing Co.* v. *Industrial Com.*, 299 Ill. 189, 132 N. E. 511; *McNaught* v. *Hines*, 300 Ill. 167, 133 N. E. 53).

For convenience of reference the so-called compulsory

1917 amendment to section 3 of the Act and which presently remains in the law is stated herewith:

> "Sec. 3. APPLIES AUTOMATICALLY.) The provisions of this Act hereinafter following shall apply automatically and without election to * * * all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely:"

Immediately following the above-quoted paragraph the Illinois legislature listed the enterprises or businesses declared to be extra hazardous including, "(3) Carriage by land, water or aerial service and loading or unloading in connection therewith, * * *," and obviously the petitioner's business or enterprise of operating motor buses carrying passengers for hire falls within such last mentioned classification.

Prior to the 1917 amendment it had been considered that if the business or enterprise was extra hazardous, only those departments of the business where extra hazardous work was done were under the Act, but as stated in *Ready & Callaghan Coal Co.* v. *Industrial Com.*, 306 Ill. 112, at 115, 137 N. E. 432: "* * * but since the amendment of 1917 all departments of an extra hazardous business are within the Act and all employees in every department are automatically brought under the act without election of the employer. * * *" (Underscoring supplied.)

In the instant case the petitioner was not operating two separate businesses. It was operating only one business —carrying passengers for hire—and such business clearly falls within the extra hazardous classification as declared by the legislature of the State of Illinois and therefore defendant was automatically bound by the provisions of the Illinois Workmen's Compensation Act as to all phases and departments of its business conducted or operated within the State of Illinois. The only exceptions to the

Workmen's Compensation Act[13] recognized by Illinois law relate to employers engaged in interstate commerce by railroad, in which case the Federal Employer's Liability Act[14] (45 U. S. C., Secs. 51 to 55) apply, and to employers whose employees are engaged in work on navigable waters of the United States in which case the Longshoremen's and Harbor Worker's Act (33 U. S. C., Sec. 901, *et seq.*), or the Jones Act (46 U. S. C., Sec. 688)[15] apply.

The holding, therefore, of the Court of Appeals that, "Illinois cases generally recognize that an employer may be bound by the Illinois Act as to some employees and some parts of its business and not bound as to others, *Cole* v. *Industrial Com.*, 353 Ill. 415, *Goldsmith* v. *Payne*, 300 Ill. 119 and cases there cited" is erroneous and contrary to the statutory and judicial declaration of the law of the State of Illinois. (*Illinois Publishing and Printing Co.* v. *Ind. Com., supra.*)

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13. Ill. Rev. Stat. 1949 Chap. 48, Sec. 142, in defining the term "employee" by its last proviso provides as follows:

> "* * * Provided further that employees shall not be included within the provisions of this Act when excluded by the laws of the United States relating to liability of employers to their employees for personal injuries where such laws are held to be exclusive."

14. As to cases pertaining to employers engaged in interstate railroad commerce, see *Staley* v. *Ill. Cent. R. R. Co.*, 268 Ill. 356, 109 N. E. 352; *Goldsmith* v. *Payne*, 300 Ill. 119, 133 N. E. 52; *Brink* v. *Industrial Com.*, 368 Ill. 607, 15 N. E. (2) 491.

The Federal Employer's Liability Act has application only to railroads engaged in interstate commerce. It has no application to common carriers such as a motor bus such as the petitioner in the instant case (*DeVaul* v. *Southern Kansas Stage Lines*, 95 P. (2d) 541, 150 Kansas 641).

15. As to employers whose employees are engaged in work on navigable waters, see *Southern Pac. Co.* v. *Jensen*, 244 U. S. 205, 61 L. ed. 1086; *Knickerbocker Co.* v. *Stewart*, 253 U. S. 149, 64 L. ed. 834; *State Industrial Commission* v. *Nordenholt*, 259 U. S. 263, 66 L. ed. 933; *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 86 L. ed. 184; *Davis* v. *Department of Labor*, 317 U. S. 249, 87 L. ed. 246; *Swanson* v. *Marra Bros.*, 328 U. S. 1, 90 L. ed. 1045.

The Court of Appeals misconstrued the holding in *Cole* v. *Industrial Co., supra,* inasmuch as in that case no issue was presented as to whether or not the employer was bound by the Workmen's Compensation Act of Illinois and the Supreme Court of Illinois did not purport, expressly or by implication, to create an additional exception to the Workmen's Compensation Act under the facts of that case. The proper interpretation of the *Cole* case, in the light of the decisions of this court in the cases of *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 76 L. ed. 1026; *Alaska Packers Association* v. *Industrial Accident Commission of California,* 294 U. S. 532, 79 L. ed. 1044, and *Pacific Employers Insurance Co.* v. *Industrial Accident Commission of California,* 306 U. S. 493, 83 L. ed. 940, *supra,* is that Illinois may subordinate its remedy to that of another state in a proper case. The *Cole* case, *supra,* does not hold that Michigan law pre-empts or excludes the employer from the operation of the Illinois Act or holds him bound by the Act on an individual or piecemeal basis, as to one part of his business and not as to another.

The Court of Appeals should have followed the interpretation of an Illinois statute strictly, rather than create a new exception thereto. (*Breisch* v. *Central R. R. of N. J.,* 312 U. S. 484, 85 L. ed. 964; *Madden* v. *Commonwealth of Kentucky,* 309 U. S. 83, 84 L. ed. 590; *Jones* v. *Prairie Oil & Gas Co.,* 273 U. S. 195, 71 L. ed. 602; see 35 Corpus Juris Secundum 1247, *et seq.,* Federal Courts § 171 and many cases cited therein.)

The case of *Goldsmith* v. *Payne,* 300 Ill. 119, 133 N. E. 52, involved an employer engaged in interstate commerce by railroad, and as to that employer's interstate activities, the Illinois Workmen's Compensation Law is excluded by the Federal Employer's Liabilities Act. That case has no relevance to the facts in the case at bar and no further comment need be given to it.

Conclusion.

Your petitioner earnestly contends that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, and has decided an important question of federal law, that is, the extra-state effect of the Michigan Workmens Compensation Act as to persons and events in Illinois under the circumstances of this case, in a way probably in conflict with the applicable decisions of this court. Wherefore, your petitioner earnestly prays that a writ of certiorari be issued to the end that the case be more fully considered by this court, and upon review, that the judgment be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 187

INDIAN TRAILS, INC.,
Petitioner,

vs.

THOMAS HYNES,
Respondent.

RESPONDENT'S BRIEF

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SUMMARY OF ARGUMENT.

(a) Section 29 of the Illinois Workmen's Compensation Act is not a defense to this action because defendant at the time and place of the occurrence was not bound by said Illinois Compensation Act. Defendant was then and there engaged in a business in which it was bound by the Michigan Workmen's Compensation Act, and is therefore not entitled to the benefits of Section 29 of the Illinois Compensation Act in favor of employers who are bound by the latter Act. Under the circumstances shown in this record plaintiff's right of action was not transferred to his employer..... 7-20

(b) The law of the State of Illinois, the lex loci delicti, was binding on the Court of Appeals in this case, and its judgment herein is solely based on that law as construed by the Illinois Courts.....21-23

(c) The law of Illinois has been applied in this case. 24-25

(d) Under Illinois law, when a part of an employer's business is being carried on in Illinois under the extra-territorial workmen's compensation law of another state, the employer and his employees engaged in such part of the business are not affected by Section 3 of the Illinois Workmen's Compensation Act and are not bound by the Illinois Act. 25-26

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

In this brief we shall refer to the petitioner, Indian Trails, Inc., as the defendant, and to the respondent as the plaintiff. And for the sake of brevity we shall refer to the first paragraph of Section 29 of the Illinois Workmen's Compensation Act (Illinois Revised Statutes, 1949, Chap. 48, sec. 166, quoted at pp. 17, 18 of Petitioner's Brief) as Section 29 without further qualification.

At page 2 of the Petition, in the "summary and short statement of the matter involved" (which is incorporated

by reference as petitioner's statement of the case, Petitioner's Brief, 16) defendant refers to the fact that Buckley (the employee driving its motor bus) was hired in Michigan, and continues:

> "* * * as to the business operations of the petitioner and this employee in the State of Illinois, petitioner was simultaneously and concurrently bound by the Workmen's Compensation Act of Michigan *as well as the Workmen's Compensation Act of Illinois.*" (Italics ours.)

The statement that Buckley and defendant were bound by the Illinois Workmen's Compensation Act is contrary to defendant's formal admissions made in the Court of Appeals, as noted in that Court's opinion (R. 250, 251). In its printed Appellant's Brief filed in the Court of Appeals, at pages 20 and 21, defendant said:

> "It is believed the basis of plaintiff's contention in this regard is based upon the facts (1) the defendant's employee—the said Irving Buckley—who was driving defendant's motor bus at the time of the accident was hired in the State of Michigan and therefore that Buckley was not *bound* by the terms and provisions of the Workmen's Compensation Act of Illinois; (2) that defendant's operations in the State of Michigan, where Buckley was hired, were under and subject to the terms and provisions of the Workmen's Compensation Act of that State, and (3) the Michigan Act is extraterritorial in that it covers injuries sustained outside the State of Michigan by employees in cases where the contract of hire was made in Michigan.
>
> "Defendant admits the foregoing three enumerated facts upon which plaintiff's contention is predicated, but defendant respectfully submits the existence of such facts is without legal significance in the consideration of the determinative question—Whether under the circumstances of the instant case the plaintiff was without legal capacity to institute and maintain the present action?
>
> "In support of defendant's position, attention is

> respectfully called to the fact that Buckley is not a party to the present suit. It is not contended that Buckley was bound by the Workmen's Compensation Act of Illinois either before or at the time of the accident in question. Moreover, defendant respectfully submits that had the present action been brought against Buckley, the latter could not have successfully contended that he was 'bound' by the Illinois Workmen's Compensation Act as the term is used in such Act, particularly in Section 29."

Thus defendant categorically admitted that in respect to Buckley and the business operation carried on through him on this occasion defendant was not bound by the Illinois Compensation Act, since being bound by that Act is necessarily reciprocal: if the employee is not bound the employer is not bound.

The assertion that defendant was bound by the Illinois Act in respect to the operations carried on through Buckley is repeated by defendant at pages 3 and 12 of the Petition. At page 12 defendant charges that the Court of Appeals *overlooked* the fact that defendant and Buckley were bound by the Illinois Act. The impropriety of such a charge, when defendant had admitted that the fact was non-existent, requires no comment.

The evidence at the trial showed that Buckley was the only operator of the defendant's bus on this trip from Owosso to Chicago (R. 165); no other employee of defendant was involved in the operation of the bus; the trip was a regular, scheduled trip from Owosso to Chicago (R. 164), and Buckley's work was picking up passengers, letting them off, driving the bus (R. 165).

Buckley was injured in the accident; his eye was cut by broken glass and he bled considerably (R. 168). He was disabled from working for about a week following the accident (R. 186). With his wife and three children he lived at Owosso, Michigan. His work as a driver for de-

fendant brought him on trips to Chicago possibly twice a week (R. 165).

At the trial the plaintiff proved the law of Michigan by introducing in evidence Plaintiff's Exhibit 9 (R. 215 *et seq.*), an official pamphlet copy of the Michigan Workmen's Compensation Act (2 Michigan Comp. Laws, 1929, Sec. 8407 *et seq.*, as amended). Sufficient excerpts from Plaintiff's Exhibit 9 are contained in the printed record to show the general scheme of the Michigan Act.

The Michigan Act contained the usual provision found in workmen's compensation laws that an employee who receives a personal injury arising out of and in the course of his employment by an employer subject to the provisions of the Act shall be paid compensation as specified in the Act (Sec. 8417, R. 219).

Section 8410 of the Michigan Act. (R. 217) was as follows:

> "Where the conditions of liability under this act exist, the right to the recovery of compensation benefits, as herein provided, shall be the exclusive remedy against the employer."

Section 8458 of the Michigan Act (R. 220) was as follows:

> "The Industrial accident board shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state, in those cases where the injured employee is a resident of this state at the time of the injury, and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

Although defendant bases some of its argument on the assertion that Buckley made no claim on account of his injuries against defendant under Michigan law (Petitioner's Brief, 35), there is no evidence in the record as to whether Buckley did or did not make a claim, nor as to whether he was provided with medical services or paid compensation by defendant under the Michigan Act.

POINTS AND AUTHORITIES

I.

Under the Law of Illinois as interpreted by the Courts of that state defendant was not bound by the Illinois Workmen's Compensation Act in respect to the business out of which this action arose, and Section 29 is therefore no defense to the action.

Biddy v. *Blue Bird Air Service,* 374 Ill. 506.

Cole v. *Industrial Commission,* 353 Ill. 415.

Miller v. *Yellow Cab Co.,* 308 Ill. App. 217.

Michigan Workmen's Compensation Act.

Victor v. *Dehmlow,* 405 Ill. 249.

Cipperly v. *Carmack,* 258 Ill. App. 593.

Foster v. *Denny Motor Transfer Co.,* 7 Cir., 100 F. (2d) 658.

Capelle v. *Chicago & N. W. R. Co.,* 280 Ill. App. 471.

McNaught v. *Davis,* 229 Ill. App. 253.

Brown v. *Illinois Terminal Co.,* 237 Ill. App. 145; aff'd 319 Ill. 326.

Runge v. *Chicago Junction R. Co.,* 226 Ill. App. 187.

La Rue v. *Indiana Harbor Belt R. Co.,* 288 Ill. App. 387.

McMullen v. *Illinois Central R. Co.,* 234 Ill. App. 416.

Wintersteen v. *National Cooperage Co.,* 361 Ill. 95.

II.

The law of the State of Illinois, the lex loci delicti, was binding on the Court of Appeals in deciding this case, and its judgment herein is solely based on that law as construed by the Illinois courts.

Biddy v. *Blue Bird Air Service,* 374 Ill. 506.
Cole v. *Industrial Commission,* 353 Ill. 415.
Miller v. *Yellow Cab Co.,* 308 Ill. App. 217.
Erie R. Co. v. *Tompkins,* 304 U. S. 64

III.

The law of Illinois has been applied in this case.

Goldsmith v. *Payne,* 300 Ill. 119.
Victor v. *Dehmlow,* 405 Ill. 249.

IV.

Under Illinois law, when a part of an employer's business is being carried on in Illinois under the extraterritorial workmen's compensation law of another state, the employer and his employees engaged in such part of the business are not affected by Section 3 of the Illinois Workmen's Compensation Act, and are not bound by the Illinois Act.

Cole v. *Industrial Commission,* 353 Ill. 415.
Biddy v. *Blue Bird Air Service,* 374 Ill. 506.
Miller v. *Yellow Cab Co.,* 308 Ill. App. 217.

ARGUMENT

I.

Under the law of Illinois as interpreted by the Courts of that state defendant was not bound by the Illinois Workmen's Compensation Act in respect to the business out of which this action arose, and Section 29 is therefore no defense to the action.

The Illinois Courts have held that if an employer and employee working in Illinois are bound by the workmen's compensation law of a foreign state, the employer is not bound by the Illinois Workmen's Compensation Act in respect to business transacted through such employee. The foreign compensation law operates to prevent the employer from being bound the same as the Federal Employers' Liability Act operates to prevent a railroad company from being bound as to its interstate business. The reason for the rule is that since the foreign compensation law is extraterritorial and provides the employee with a remedy to the exclusion of all other remedies, the employer is not bound by the Illinois Act, although he may be bound as to other employees and activities in Illinois. This Illinois rule is one that is not followed in certain other states (cf. *Pacific Employers Ins. Co.* v. *Industrial Accident Commission of California,* 306 U. S. 493), but the Illinois Courts have the right to construe Illinois laws and determine under what circumstances they shall be held binding.

The case of *Biddy* v. *Blue Bird Air Service,* 374 Ill. 506, is significant in that it specifically passed on the application

of the Illinois Compensation Act to a Michigan employer and employee working in Illinois. One of the defenses in that case was that Biddy, plaintiff's intestate, and his employer, a picture company, were operating under the Illinois Compensation Act, and that Section 29 therefore applied. Biddy was hired in Michigan by a Michigan employer, who had a place of business in Illinois. Biddy was killed in an accident in Illinois. The Court held that Biddy and his employer the picture company were not subject to the Illinois Compensation Act, saying:

> "The contention that Biddy and the Picture Company were subject to the Workmen's Compensation Act of this State need not be given extended consideration. Plaintiff's motion to strike defendants' special defenses admitted the facts well pleaded, and by such pleading and the evidence it appears that Biddy and the Picture Company had a contract of hire which had been entered into in Michigan and that both had elected to be bound by the Workmen's Compensation Act of that State. After Biddy's death the Department of Labor and Industry, acting under the authority of the Michigan Workmen's Compensation Act, approved an award for the benefit of Biddy's dependents. The Picture Company or its insurance carrier paid the award. A state of facts involving the same principle of law was before this court in *Cole* v. *Industrial Comm.*, 353 Ill. 415, 187 N. E. 520, 90 A. L. R. 116. There an employer and employee, both residents of Indiana and subject to its Workmen's Compensation Act, were operating under a contract made in Indiana. While the employee was engaged in work under the contract in this State, he sustained an accidental injury from which he died. Compensation under the Illinois act was claimed by the dependents. This court held that since the contract was made in Indiana, the parties were bound by the Workmen's Compensation Act of that State and that the Illinois Act was not applicable. Under the admitted facts and the rule announced in the *Cole case, the Picture Company* and Biddy *were not subject to the Workmen's Compensation Act of Illinois.*" (Italics ours.)

In *Cole* v. *Industrial Comm.*, 353 Ill. 415, the employer, Cole, was in the construction business in Indiana, where he hired an employee named Thews, who was a resident of Indiana. The employer contracted to do some work in Kankakee County, Illinois, and sent Thews there to work. While working in Illinois Thews sustained a fatal injury, and his widow claimed compensation under the Illinois Compensation Act. The employer carried compensation insurance under both the Indiana Compensation Act and the Illinois Compensation Act, and hence was bound by both Acts. The Indiana Compensation Act contained an extraterritorial provision. The court held that the employer was not bound by the Illinois Compensation Act in respect to Thews' employment. The Court said:

> "The contract of employment herein having been entered into in the state of Indiana between parties who were subject to the terms of the Indiana Compensation Act, the provisions of the Act for an exclusive remedy under it must prevail. No other remedy is available. *Johnston* v. *Industrial Comm.*, 352 Ill. 74, 185 N. E. 191.
>
> "The judgment of the Circuit Court of Kankakee county confirming the award is therefore reversed, and the application for compensation as filed with the Industrial Commission is dismissed."

In *Miller* v. *Yellow Cab Co.*, 308 Ill. App. 217, 31 N. E. (2d) 406, the plaintiff was an employee of Sears, Roebuck & Co. and had been hired in Texas, where he lived and worked as a store manager. While in Chicago on a business trip visiting his employer's home office he was injured riding as a passenger in a taxi of the Yellow Cab Co., whom he sued for damages. Sears, Roebuck & Co. was bound by the Illinois Workmen's Compensation Act as to its Illinois employees, and was also bound by the Texas Workmen's Compensation Act, which contained an extraterritorial provision making it apply to injuries occurring

outside Texas when the contract of hire was made in that state. The defendant cab company invoked Section 29 as a defensse to the action, contending that since Sears, Roebuck & Co. was bound by the Illinois Act and the accident occurred in Illinois in the course of plaintiff's employment, plaintiff was bound by the Illinois Act and therefore could not maintain the action. Citing the *Cole Case* (353 Ill. 415), the Appellate Court held that the plaintiff and Sears, Roebuck & Co. were not bound by or operating under the Illinois Compensation Act at the time of the accident, but were bound by the Texas Act, so that Section 29 was no defense. The Court said, at 308 Ill. App. p. 232:

> "* * * It is manifest, therefore, that the public policy of Illinois is not opposed to the maintenance of the action in the instant case. The place where the accident occurred is not a decisive factor as to whether the Illinois Workmen's Compensation Act applies, or the compensation act of the state where the contract of employment was made and where the injured person was domiciled and where his employment was to be performed. The contract of plaintiff and Sears, Roebuck & Company was entered into in the State of Texas and the parties contemplated that the law of the State of Texas should govern their rights."

Since the facts pertaining to the employment relationship between defendant herein and its employee Buckley were in all respects the same as those between the employers and employees discussed in the above mentioned decisions, it is obvious that defendant and Buckley were bound solely by the Michigan Workmen's Compensation Act at the time and place of the occurrence giving rise to this action, and were not concurrently or otherwise bound by the Illinois Compensation Act.

Section 29 does not purport, either literally or by construction, to provide a shield to protect persons bound

by the Act against claims such as plaintiff's under any and all circumstances. For instance, the plaintiff Hynes was a "person bound by the Act" in respect to his employment as a motorman by Chicago Surface Lines; if a Western Union messenger, who was bound by the Illinois Compensation Act, while delivering a telegram were struck and injured by Hynes' automobile when Hynes was driving his automobile on personal business not connected with his employment, the messenger would collect compensation from his employer. But could Hynes claim the protection of Section 29 in an action brought by the messenger? Although Section 29 is a defense under certain circumstances to employees as well as employers bound by the Act (*Thornton* v. *Herman,* 380 Ill. 341) the answer to the question is no, since on the facts stated Hynes was not engaged in an activity in which he was bound by the Act.

We must therefore inquire, what are the limits of the exemption from liability that Section 29 affords, and under what circumstances is it a defense?

Turning first to the language of Section 29 itself (Petition, 17) we find that the injured employee's right of action is transferred to his employer only when a compensable injury is sustained under the following circumstances: (1) creating a legal liability for damages in some third person, and (2) such third person being bound by the Act. The word "circumstance" has a well settled meaning: a condition, fact or event accompanying the occurrence of another fact or event. Thus the language of the Act itself requires that in order for Section 29 to apply the third person's being bound by the Act must be one of the conditions or facts immediately accompanying and connected with the injury; the particuar business or activity in which the third person is engaged at the time and place of the injury must be one in which he is bound by the Act.

It is immaterial that the third person be bound by the Act in respect to other branches of his business or other employees whose activities are not connected with the injury.

The foregoing construction has consistently been applied to Section 29 by the Illinois courts.

The latest decision of the Illinois Supreme Court on this question is *Victor* v. *Dehmlow,* 405 Ill. 249, 90 N. E. (2d) 724, in which rehearing was denied March 20, 1950. In that case the plaintiff administratrix claimed damages for the death of her intestate Victor, who was fatally injured when struck by a motor truck. Defendants were William A. Dehmlow, the owner of the truck, who was in the cleaning and dyeing business, and his son William L. Dehmlow, who was driving the truck. Plaintiff alleged that William L. Dehmlow was the agent, but not the employee, of his father in driving the truck. Defendants pleaded that Victor and his employer were bound by the Illinois Workmen's Compensation Act, that the accident occurred in the course of Victor's employment, that William L. Dehmlow was an employee of his father so that both defendants were bound by the Compensation Act, and claimed Section 29 as a defense to the action. In reply the plaintiff denied that the relationship of employer and employee existed between the defendants, and contended that the relationship was merely that of principal and agent, and that they were therefore not bound by the Compensation Act. It was conceded that William A. Dehmlow, being in the cleaning and dyeing business, was bound by the Compensation Act, but plaintiff's theory was that since the tort was committed through an agent who was not an employee, section 29 was no defense.

The evidence, as recited in the opinion, was that William L. Dehmlow was a high school student 18 years old, was not carried on his father's payroll as an employee, nor was

he paid any wages; his father supported him, and he drove the truck for his father after school hours. The Court upheld the plaintiff's contentions, holding that it was necessary for the defendants to prove affirmatively that the relationship between the defendants was one governed by the Illinois Workmen's Compensation Act, and that the proof on that point was insufficient. The Court said:

> "It thus became incumbent upon defendants to prove by a preponderance of the evidence that: (1) Harry P. Victor at the time he was killed was in the course of his employment; and (2) that *both* William A. Dehmlow and William L. Dehmlow were within the terms of the Workmen's Compensation Act. If there was a failure to establish either of these elements, the plaintiff was entitled to maintain her common-law action".
>
> * * * * *
>
> "The answer specifically alleges that William A. Dehmlow and his agents and employees, *including William L. Dehmlow,* were bound by the provisions of the Workmen's Compensation Act. It then became incumbent for the defendants to establish this fact by proof. There is no evidence in the record that at the time of the accident William L. Dehmlow was engaged in any occupation or service for another, except the declaration of the mother, who, on cross-examination, conceded that she only had information from another, and William L. Dehmlow was not called as a witness. So, regardless of the legal question of whether a minor son is in the service of, or an employee of, his father, the proof falls short of establishing such a defense as a matter of law."

In the trial court plaintiff had recovered a judgment against both defendants, which was reversed by the Illinois Appellate Court on the ground that Section 29 was a defense. The Supreme Court reversed the Appellate Court's judgment and remanded the case to the Appellate Court with directions to consider other assignments of error which had not been ruled on in the Appellate Court's judgment.

In the *Victor case* the evidence was held insufficient to show that the truck driver was an employee or in the service of his father, so as to be bound by the Illinois Compensation Act, and such insufficiency precluded the father from claiming Section 29 as a defense. In the present case it affirmatively appears, and defendant has admitted, that its bus driver Buckley was not bound by the Illinois Compensation Act but was bound solely by the Michigan Act. Hence defendant under the rules reiterated in the *Victor case* is not entitled to the benefit of Section 29.

In *Goldsmith* v. *Payne,* 300 Ill. 119, the defendant was the Director General of railroads operating the Chicago & North Western Railway. The plaintiff was injured in a grade crossing accident in Waukegan, through the alleged negligence of defendant's employees in operating a train. The plaintiff at the time of the accident was employed as a truck driver and was bound by the provisions of the Illinois Workmen's Compensation Act. The plaintiff alleged that the train by which he was struck was an interstate train, so that the defendant and the employees operating it would not be bound by the Illinois Compensation Act but would be governed by the federal employer's liability act in reference to interstate railroads. The defendant pleaded that he was bound by the Workmen's Compensation Act as to his intrastate employees and that Section 29 was therefore a defense to plaintiff's claim. Plaintiff's demurrer to the plea was overruled. The trial court entered judgment for defendant when plaintiff stood by his demurrer. Plaintiff appealed to the Supreme Court, where the trial court's judgment was reversed and the cause was remanded with directions to sustain the demurrer.

The Supreme Court held that since defendant at the time of the occurrence was operating an interstate train through employees who were not bound by the Illinois Workmen's

Compensation Act, defendant was excluded from the provisions of the Compensation Act and was not entitled to the benefit of Section 29. The fact that defendant had other employees engaged in intrastate commerce, as to whom defendant was bound by the Act, was immaterial. The Court said:

> "While the federal Employers' Liability Act has no application to the appellant or his injury, it does have the effect of excluding the appellee from the provisions of the Workmen's Compensation Act as to the business in which he was engaged when the appellant was injured. Therefore, when engaged in interstate commerce the *appellee* and his employees so engaged are *not bound by the act,* and he is not entitled to the benefit of the provisions of Section 29 in favor of employers who are bound by the act. The pleas did not state any defense to the action." (Italics ours.)

It should be noted that the fundamental reason for the court's ruling in the *Goldsmith case* (300 Ill. 119), which we have just quoted, was that defendant-appellee was not bound by the Act as to the particular business in which he was engaged at the time and place of the injury; the fact that defendant was engaged in interstate commerce by rail and thereby bound by the Federal Employers' Liability Act as to his employees involved in the accident was merely a secondary fact or circumstance that prevented defendant from being bound by the Compensation Act.

The rule announced in *Goldsmith* v. *Payne,* 300 Ill. 119, was followed in *McNaught* v. *Davis,* 229 Ill. App. 253; *Brown* v. *Illinois Terminal Co.,* 237 Ill. App. 145; affirmed 319 Ill. 326; *Runge* v. *Chicago Junction R. Co.,* 226 Ill. App. 187; *La Rue* v. *Indiana Harbor B. R. Co.,* 288 Ill. App. 387; *McMullen* v. *Illinois C. R. Co.,* 234 Ill. App. 416.

In *Capelle* v. *Chicago & N. W. Ry. Co.,* 280 Ill. App. 471,

the plaintiff was struck at a grade crossing by an intrastate train. The defendant railroad and its employees operating the train were bound by and operating under the Illinois Compensation Act, and plaintiff was also bound by the Act at the time of the injury. Defendant therefore urged that Section 29 was a defense to the action. But plaintiff alleged that the injury resulted from the negligence of the defendant's crossing flagman, who failed to give plaintiff timely warning of the approach of the train, and not from negligence in the operation of the train. Plaintiff contended that since the alleged tort was committed by defendant through an employee who was not bound by the Illinois Compensation Act, defendant was not so bound and was precluded from claiming the benefit of Section 29. It is well settled that a crossing flagman guarding a crossing used by both intrastate trains and interstate trains is engaged in interstate commerce at all times, and hence not bound by the Compensation Act. The Appellate Court held defendant was barred from claiming the benefit of Section 29, since plaintiff's injury resulted from the negligence of defendant's employee who was not bound by the Compensation Act. It should be noted that Capelle's injury was caused in part by defendant's intrastate activity through its employees who were present and operating the train; but the Court held that the controlling fact was that the alleged negligence was committed through an employee who was not bound by the Compensation Act.

Foster v. *Denny Motor Transfer Co.*, 7 Cir., 100 F. (2d) 658, involved facts analogous to those in the case at bar. There the plaintiff and his employer were bound by the Illinois Workmen's Compensation Act (which is extraterritorial), and the injury occurred in the course of plaintiff's employment. Defendant was a trucking company doing business in Indiana and in Illinois, and was bound by

the compensation laws of both states. At the time and place of the accident, which occurred in Indiana, defendant and its employee involved in the collision were operating under the Indiana Compensation Act. Defendant urged that since plaintiff was bound by the Illinois Compensation Act and defendant was also bound by that Act, Section 29 was a defense to the action. But the Court held that since defendant under the circumstances of the accident was operating under and bound by the Indiana Compensation Act, Section 29 had no application. Judge Evans said:

> "The theory seems to be, where the limitation of the common law liability against a stranger tort feasor is embodied in a legislative provision similar to Section 29 of the Compensation Act, that the restricted liability of the tort feasor is limited to cases where the tort feasor is also an employer and subject to the same state compensation act. * * *
>
> "Quite different is the situation where the tort feasor is an Indiana corporation operating under the Indiana Compensation Law, which is dissimilar to Section 29 of the Illinois Act. * * *
>
> "In *Goldsmith* v. *Payne,* 300 Ill. 119, the court recognized a limitation to the applicability of Section 29."

In the *Foster case,* from which we have just quoted, the accident occurred in Indiana, but that fact does not lessen its value as a precedent in the present case. The *Foster case* was tried in a District Court in Illinois, where an Illinois statute would be given all of the force it is entitled to. The situation of defendant was exactly the same as that claimed by the defendant in the present case: it was bound by the Illinois Act in respect to certain employees, but defendant and its employee at the time and place of the accident were engaged in an activity in which it was bound by the Indiana Act. While Judge Evans in the opinion in the *Foster case* referred several times to the fact that the accident occurred in Indiana, a careful reading

of the opinion will show that the real basis of the decision was the rule announced in *Goldsmith* v. *Payne,* 300 Ill. 119, which held that Section 29 was no defense unless defendant and its employee involved in an accident were bound by the Illinois Compensation Act.

In *Cipperly* v. *Carmack,* 258 Ill. App. 593, the defendant was an employer who had employees under the Workmen's Compensation Act, but at the time of the automobile accident involved in the case he was personally driving his car and none of his employees was involved. The Court held that under the circumstances Section 29 was no defense, since at the time and place of the accident defendant was not operating under the Act. The Court said, at 258 Ill. App. 597:

> "We do not understand the rule to be that an employer under such circumstances as set up in the amended special plea could escape liability for his own negligent act, because the business which he was operating was such as would bring him in connection with his employees under the Compensation Act. The protection of the Workmen's Compensation Act is not available to a negligent third party merely because he happens to be an employer of labor and as to his employees is within the statute. The negligent acts of an employer in the careless operation of an automobile which he was driving, going to and from his place of business, causing injury to an employee of another, are not within the protection of the Compensation Act. *Podgorski* v. *Kerwin,* 144 Minn. 313, 175 N. W. 694; *Smale* v. *Wrought Washer Mfg. Co.,* 160 Wis. 331, 151 N. W. 803."

From a consideration of the foregoing decisions it is apparent that for Section 29 to be a defense to an employer in an action for damages by an injured person four essential facts must be shown:

1. The injury arose out of and in the course of plaintiff's employment.

2. The plaintiff and his employer were bound by the Illinois Compensation Act.

3. The defendant was bound by the Illinois Compensation Act in respect to the particular business being transacted at the time and place of the accident.

4. The defendant's employee through whom the alleged tort was committed was bound by the provisions of the Illinois Compensation Act at the time and place of the occurrence. It is not sufficient that defendant had other employees in respect to whom he was bound by the Act.

In this case therefore, the third and fourth of the above-mentioned essential facts are lacking, and Section 29 is no defense.

It should be noted that for Section 29 to be a defense to an employer the defendant, the defendant's employee, the plaintiff and the plaintiff's employer must be all bound by the Illinois Compensation Act in respect to the occurrence. It is not sufficient for one of the employers to be bound by the compensation law of some other state; *Wintersteen* v. *National Cooperage Co.*, 361 Ill. 95; *Miller* v. *Yellow Cab Co.*, 308 Ill. App. 217.

Defendant specifically admits that it was bound by the Michigan Workmen's Compensation Act; admits that the Michigan Act is extra-territorial in that it binds employers to pay compensation for injuries to employees sustained outside Michigan where the contract of hire was made in Michigan; admits that Buckley, its sole employee involved in this accident was hired in Michigan and was not bound by the Illinois Compensation Act. Putting all these admissions together we get the general admission that defendant and its employee at the time and place of this accident were engaged in a part of defendant's business in which defendant was bound by the Michigan Compensation Act. Under the rule announced in the *Biddy case* (374 Ill. 506)

and the *Cole case* (353 Ill. 415) defendant was therefore not then and there bound by the Illinois Workmen's Compensation Act.

Paraphrasing what the Illinois Supreme Court said in the *Goldsmith case* (300 Ill. 119), we submit that while the Michigan Workmen's Compensation Act has no application to plaintiff or his injury, it does have the effect of excluding defendant from the provisions of the Illinois Workmen's Compensation Act as to the business in which defendant was engaged when plaintiff was injured. Therefore when engaged in a business in which defendant was bound by the Michigan Act, defendant and its employee are not bound by the Illinois Act, and defendant is not entitled to the benefit of Section 29 of the Illinois Act in favor of employers who are bound by the Illinois Act.

In *Thornton* v. *Herman,* 380 Ill. 341, cited at page 19 of Petitioner's Brief, the facts were that the defendant and plaintiff were employees bound by the Illinois Compensation Act; the accident occurred while defendant and plaintiff were working in the course of their respective employments under the Compensation Act. The sole question in dispute was whether an employee bound by the Act could claim the benefit of Section 29 to the same extent as an employer bound by the Act. The Court held that he could, but the language of the opinion must be read in the light of the facts involved in the case. If the accident had occurred otherwise than in the course of defendant's employment under the Act, as in the present case, the Court would doubtless have held Section 29 no defense.

II.

The law of the State of Illinois, the lex loci delicti, was binding on the Court of Appeals in deciding this case, and its judgment herein is solely based on that law as construed by the Illinois courts.

Part of the *lex loci* of Illinois are the decisions of Illinois courts determining the circumstances under which an employer will be deemed bound by the Illinois Compensation Act and the circumstances that will permit a defendant to avail himself of the defense of Section 29. The fact that those decisions involve questions of conflicts of laws does not render them any the less part of the *lex loci*. Under the previous point we have cited Illinois decisions to show that the defendant and Buckley were not bound by the Illinois Compensation Act at the time and place of the occurrence involved herein. Defendant refuses in its argument under its second point (Petitioner's Brief, 21-31) to recognize those decisions as part of the *lex loci* of Illinois, and asks this Court to disregard those decisions as if the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, had never been heard of.

We agree with the rule adopted by the American Law Institute, quoted at page 22 of Petitioner's Brief:

> "If an agent of a foreign corporation while acting in the course of his employment commits a tort, the law of the state where the act is done determines whether his corporation is liable for the tort and the extent to which it is liable therefor."

Applying this rule to the facts in the present case, we observe that defendant is a foreign corporation whose agent and employee has committed a tort in Illinois; the employee was hired in Michigan and defendant and its employee were bound by the Michigan Workmen's Com-

pensation Act. The law of Illinois is that under such circumstances the employer and employee are not bound by the Illinois Workmen's Compensation Act. The law of the state where the act was done therefore determines that defendant is not entitled to the benefit of Section 29, and that defendant is liable for the tort to the same exent that any other person not bound by the Illinois Workmen's Compensation Act would be liable for such a tort.

At page 24 of Petitioner's Brief the following suggestion is put forth:

> "It would seem that the reasonable scope of the extra-territorial provisions of the Michigan Workmen's Compensation Act would be that the remedy for extra-territorial injury should be recognized when claim is made in a Michigan forum, and in the forums of other states when comity permits."

We have shown that the Illinois forums have recognized the extra-territorial provisions of the compensation laws of Michigan, Indiana and Texas; *Biddy* v. *Blue Bird Air Service,* 374 Ill. 506; *Cole* v. *Industrial Commission,* 353 Ill. 415; *Miller* v. *Yellow Cab Co.,* 308 Ill. App. 217. There is nothing in the doctrine of comity that forbids such recognition.

At page 30 of Petitioner's Brief defendant imputes to the Court of Appeals the theory "that where an employer and employee are simultaneously and concurrently bound by the Workmen's Compensation Act of two states, that the law of one state vitiates the law of the other." No such theory was advanced by the Court of Appeals or by the plaintiff herein. The theory that defendant and Buckley were concurrently bound by the compensation laws of both Michigan and Illinois is one that was suggested by defendant for the first time in this litigation at page 2 of the petition for certiorari. The petition and Petitioner's Brief contain no argument in support of this theory, but

the case of *Industrial Commission of Wisconsin* v. *McCartin*, 330 U. S. 622, is cited in a footnote on page 2 of the petition. That case involved the law of Wisconsin, not the law of Illinois. The Wisconsin compensation law provides that if an employee hired in a foreign state having an extra-territorial compensation law is injured while working in Wisconsin, the Wisconsin Industrial Commission may award the employee an amount of compensation representing the difference between the amount of compensation payable for the injury under the law of the state where the man was hired and the amount that would be payable under the Wisconsin law if the man had been hired in Wisconsin. Thus under Wisconsin law it is possible for an employer and employee working in Wisconsin to be concurrently bound by the compensation laws of Wisconsin and another state where the contract of hire was made. Under the doctrine of *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, Wisconsin had the right, but was not obliged, to adopt such a law if it chose to do so. However in Illinois the law is different; there is nothing in the Illinois statute giving any benefits to employees bound by the compensation laws of other states, and our Courts have adopted the policy and rule of decision that a man hired in a foreign state having an extra-territorial compensation law is bound by the provisions of the compensation law of the state where he was hired, and that his employer is not bound to pay him compensation under Illinois law; *Cole* v. *Industrial Commission*, 353 Ill. 415. This Illinois rule is one that the state had the right to adopt and enforce, and it has been followed as part of the *lex loci delicti* by the Court of Appeals in this case.

III.

The law of Illinois has been applied in this case.

We believe enough has been said under our previous points to show that the law of Illinois has been applied as the controlling law in this case. The defendant is attempting to have Section 29 apply where it has never been applied before, and asks the Court to overrule and disregard the decisions of the Illinois courts on the subject. We are not attempting to blaze new legal trails: we merely ask that the Illinois law be applied to this case as it has been settled for many years by the Illinois statute and Illinois decisions.

Under its third point (Petitioner's Brief, 31-37) defendant discusses the conflicting interests of the states of Michigan and Illinois in the subject matter of this litigation, and says that Michigan law ought not to vitiate and override Illinois law. Defendant here impliedly concedes that it was not bound by the Illinois Compensation Act as to Buckley, but that nevertheless it should be considered bound in some esoteric way so that it will be enabled to claim the benefit of Section 29 and defeat the plaintiff's claim. In other words, defendant is not bound as to liability, but is bound for the purpose of defending against a liability. Section 29 is susceptible of no such interpretation. It simply says that the person must be "bound by the Act" in order that Section 29 may be a defense. If defendant was not bound as to Buckley in respect to this occurrence it was not bound as to anyone and was not bound at all.

Defendant's contention that it should have the benefit of Section 29 because it was bound by the Illinois Compensation Act as to employees and activities other than Buckley and the business he was engaged in cannot be sustained

since it runs counter to *Goldsmith* v. *Payne*, 300 Ill. 119, and *Victor* v. *Dehmlow*, 405 Ill. 249, in which it was held that Section 29 afforded no defense unless the defendant was bound by the Act in respect to the employee through whom the tort was committed. In both of those cases it was conceded that defendants were bound by the Act in respect to employees other than the agents through whom the torts were committed.

IV.

Under Illinois law, when a part of an employer's business is being carried on in Illinois under the extra-territorial workmen's compensation law of another state, the employer and his employees engaged in such part of the business are not affected by Section 3 of the Illinois Workmen's Compensation Act, and are not bound by the Illinois Act.

Section 3 in its present form dates from an amendment passed in 1917. Prior to that time an employer was bound by the Act only in respect to those branches of his business that were declared extra-hazardous, and casual employees were excluded from the benefits of the Act. Obviously Section 3 is in conflict with the Federal Employers' Liability Act and with the extra-territorial provisions of the compensation laws of other states. Sec. 8458 of the Michigan Act (R. 220), which makes it extra-territorial, and Sec. 8410 (R. 217) which makes the remedy provided by that Act the exclusive remedy of an injured employee, are inconsistent with Section 3 of the Illinois Act, which provides that the Illinois Act shall apply to all employers and all of their employees engaged in any department of the enumerated businesses. But this conflict of laws has been resolved and settled, as all such conflicts must be, by the

Illinois Supreme Court in *Cole* v. *Industrial Comm.*, 353 Ill. 415, which was decided long after Section 3 of the Illinois Act was amended and in its present form, and in which the Court held that the extra-territorial Compensation Act of Indiana (where the contract of hire was made) and not the Compensation Act of Illinois (where the accident occurred) was controlling, and that the employer was not bound by the provisions of the Illinois Act notwithstanding Section 3. The *Cole case* was followed in *Biddy* v. *Blue Bird Air Service*, 374 Ill. 506, and *Miller* v. *Yellow Cab Co.*, 308 Ill. App. 217, in which the courts held the Compensation Acts of Michigan and Texas controlling, although in conflict with Section 3 of the Illinois Act.

We know that in other states this conflict of laws has been decided differently; in some states the courts have held that the local compensation law is entitled to a qualified or absolute precedence over the foreign law. But in this case defendant relies for an exemption from liability on an Illinois law, and must accept the construction placed on that law by the Illinois courts.

We venture to predict that in Petitioner's Reply Brief defendant, in commenting on plaintiff's arguments and on the authorities we have cited, will contend in respect to each authority that it in no wise affects the question of whether plaintiff "is without legal capacity to maintain the present action." Defendant has refused, and no doubt will continue to refuse, to face the fundamental question: Were defendant and its employee Buckley, in respect to the particular phase of defendant's business that gave rise to this injury, bound by the Illinois Workmen's Compensation Act? Defendant has not and cannot cite any fact, circumstance or authority that would justify an affirmative answer to this question.

Plaintiff's theory in this case is so clear and simple that it can be reduced to an old-fashioned formal syllogism:

1. All Michigan employers bound by the Michigan Workmen's Compensation Act in respect to business activities in Illinois carried on through employees hired in Michigan are excluded from being bound by the Illinois Compensation Act as to such business; *Biddy* v. *Blue Bird Air Service*, 374 Ill. 506.

2. At the time and place of the injury involved in the present case, defendant was a Michigan employer carrying on a business activity in Illinois through an employee hired in Michigan, namely Buckley.

3. Therefore defendant was excluded from being bound by the Illinois Compensation Act.

The question involved in this case is one of interest only to Illinois and the parties to the action. Section 29 is practically unique as a provision of a workmen's compensation law; in most states the compensation laws do not deny an injured employee the right to pursue his remedy against a negligent third-party tort feasor under any circumstances. Since the matter is of only local interest there is no substantial reason for allowing a writ of certiorari.

We therefore urge that the writ be denied.

Respectfully submitted,

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